

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA  
FRESNO DIVISION

In re	)	Case No. 21-10753--B-7
	)	
GUSTAVO DEL TORO,	)	
	)	
Debtor.	)	
	)	
	)	
	)	
PRODUCERS LIVESTOCK MARKETING ASSOCIATION,	)	Adv. Proc. No. 21-1027-B
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
GUSTAVO DEL TORO,	)	
	)	
Defendant.	)	
	)	
	)	

MEMORANDUM DECISION

Michael J. Gomez and Garrick Warrington, FRANDZEL, ROBINS BLOOM & CSATO, L.C., Los Angeles, CA, for Producers Livestock Marketing Association, Plaintiff.

Henry D. Nunez, Fresno, CA, for GUSTAVO DEL TORO, Debtor.

RENÉ LASTRETO II, Bankruptcy Judge:

INTRODUCTION

The Bankruptcy Code excepts from discharge debts for extensions, renewals, or refinancing of credit to the extent the debt is obtained by a materially false written statement respecting a debtor’s financial condition. 11 U.S.C.

1 § 523(a)(2)(B).<sup>1</sup> To be excepted from discharge, the creditor must  
2 have reasonably relied upon the written statements and the  
3 debtor must have intentionally deceived the creditor. The lender  
4 here relied upon an unsigned personal financial statement that  
5 was adopted by the debtor in renewing an existing loan and  
6 extending further credit. When the renewal and new credit came  
7 due, the balance was unpaid. The lender then obtained a state  
8 court judgment for the balance of the debt.

9 Finding all the elements necessary to except the debt from  
10 discharge, the court here rules the state court judgment is  
11 nondischargeable under § 523(a)(2)(B).  
12

13 **I**

14 **A.**

15 Debtor Gustavo Del Toro ("Del Toro") operated Del Toro  
16 Dairy in Merced, California until he filed this Chapter 7  
17 bankruptcy case in March 2021.

18 Producers Livestock Marketing Association ("Producers") is  
19 a Utah Agricultural Cooperative. Part of its market strategy is  
20 to enter into "Grazing/Feeding Agreements" with dairymen and  
21 other livestock ranches. Under these agreements, Producers  
22 places livestock with the "feeders." The feeders care for and  
23 utilize the livestock. The agreements last one year. During that  
24 time, Producers will remove and sell any non-essential  
25 livestock. At the end of the year, if the proceeds from the

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26 <sup>1</sup> Unless specified otherwise, all chapter and section references are to  
27 the Bankruptcy Code, 11 U.S.C. §§ 101-1532. References to the record in this  
28 Memorandum are: "JPO" for Joint Pre-Trial Order, Doc. #53; "PX" for Plaintiff  
Exhibit; "DX" for Defendant Exhibit; "TT1" for Trial Transcript Day 1,  
Doc. #71; and "TT2" for Trial Transcript Day 2, Doc. #72.

1 sales exceed the total dollar value of the livestock placed with  
2 the feeder (including certain handling charges), the feeder  
3 receives those proceeds. On the other hand, if there is a  
4 deficit, the feeder must remit the deficit to Producers.

5 In late November 2015, Producers and Del Toro entered into  
6 a feeding/grazing contract. Producers placed approximately 120  
7 head of livestock with Del Toro valued at approximately  
8 \$200,000.00. PX1.

9 In early 2017, Producers' and Del Toro's relationship  
10 changed. By then, Del Toro owed about \$181,000.00 to Producers.  
11 In February 2017, Del Toro signed a promissory note agreeing to  
12 pay Producers \$181,035.75 in full by December 1, 2017. PX2.

13 Del Toro also signed a security agreement. PX5. Under the  
14 agreement, Del Toro pledged virtually all personal property  
15 assets including livestock, machinery, and farm equipment. JPO.  
16 Del Toro also agreed that there would be no encumbrances or  
17 sales of those assets except in the ordinary course of Del  
18 Toro's business. *Id.*

19 Del Toro did not make the payment when the promissory note  
20 matured in December 2017. In mid-February 2018, Matt Beechinor,  
21 the branch manager of Producers' Madera office went to Del  
22 Toro's Dairy to meet with Del Toro. Producers was then  
23 considering renewing the obligation and needed updated  
24 information to evaluate whether it would renew the obligation.  
25 PX45. Beechinor brought to the meeting the 2017 personal  
26 financial statement that Del Toro previously gave Producers, as  
27 well as a blank financial statement form. *Id.* Beechinor met with  
28 Del Toro and read the financial statement line by line while Del

1 Toro provided Beechinor with the information to complete the  
2 statement. *Id.* Beechinor also went through the 2017 financial  
3 statement and asked Del Toro whether the numbers or amounts had  
4 changed at all, and if so, what those new figures were. *Id.* As  
5 Del Toro provided that information, Beechinor wrote the  
6 information on the blank financial statement. *Id.* Then,  
7 Beechinor showed Del Toro the completed form and asked him to  
8 read and review it so he could verify it was correct. *Id.* Del  
9 Toro took the form, reviewed it, said it was correct, and then  
10 handed it back to Beechinor. Beechinor told Del Toro he would  
11 "type up" the financial statement and then have him sign it when  
12 any renewal documents were sent to Del Toro if a renewal was  
13 approved.<sup>2</sup>

14 After going over the financial statement with Del Toro,  
15 Beechinor then performed an inspection of the dairy, including a  
16 cow count, measurement of silage piles, a hay count, equipment  
17 inspection, and a verification of the feed and livestock. *Id.*

18 Beechinor prepared a typewritten financial statement. PX34.  
19 The financial statement and a renewal promissory note for  
20 \$160,000.00 was prepared and sent to Del Toro. PX3. In April  
21 2018, before the renewal promissory note was signed, Del Toro  
22 purchased 33 dairy cows from A&M Livestock for the sum of  
23 \$34,389.00. DXA. Producers advanced the funds for that purchase.  
24 *Id.*<sup>3</sup>

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25 <sup>2</sup> The handwritten financial statement has apparently been lost.  
26 Producers did not provide the handwritten financial statement at trial.

27 <sup>3</sup> There is substantial dispute whether Del Toro was advised by Beechinor  
28 that he had adequate credit with Producers to purchase these cows from A&M  
Livestock. Del Toro claims Beechinor told him he had sufficient funds to  
purchase additional dairy cows. DXA. Producers disputes that Beechinor so

1           The February 2018 financial statement reflected some  
2 liabilities including \$20,000.00 in monthly payables and a  
3 \$35,000.00 note payable to Nebraska State Bank for the purchase  
4 of cows. PX34. The financial statement also reflected purchase  
5 money security interests for a Mercedes vehicle and a 125  
6 tractor. *Id.*

7           Based upon the 2018 financial statement and Del Toro's  
8 representations concerning his financial condition, Producers'  
9 president, Rick O'Brien, testified that Producers agreed to  
10 renew Del Toro's obligation. PX47. Once more based upon the 2018  
11 financial statement and Del Toro's representations concerning  
12 his financial condition, Producers agreed to advance him another  
13 \$34,389.00 so Del Toro could get more cows. *Id.*

14           At the end of May 2018, Del Toro sent a text to Beechinor  
15 that indicated he left the paperwork—referring to the renewal  
16 promissory note and the amendment to the promissory note—for  
17 Beechinor and asked him to pick up the documents. PX45. Del Toro  
18 signed the renewal note and the amendment. PX3, PX4. The renewal  
19 note was payable March 2019. PX3.<sup>4</sup> The amendment to promissory  
20 note increased the renewal note amount from \$160,000.00 to  
21 \$194,389.00. PX4.

22           When the February 2018 financial statement, March 2018  
23 renewal promissory note, and April 2018 amendment to promissory  
24 note were presented to Del Toro, he signed the promissory note  
25

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26 advised Del Toro. But there is no dispute that Producers did advance the  
\$34,389.00 so Del Toro could acquire additional cows. PX47.

27           <sup>4</sup> The February 2017 security agreement that Del Toro signed defined  
"indebtedness" as including any obligations owed Producers "whether now  
28 existing or hereafter arising, whether or not evidenced by any note . . ."  
PX5.

1 and the amendment to the promissory note. He did not sign the  
2 typewritten personal financial statement. At the same time, Del  
3 Toro owed significant debt that was not included in the  
4 financial statement.<sup>5</sup> That debt included approximately  
5 \$187,000.00 owed Harry Habib Cattle Company, \$13,777.00 to  
6 Darrold Brummel, \$9,970.00 to Foster's Pump, \$39,569.00 to  
7 Lester Moss, and \$59,114.00 to Caterpillar Financial Services.<sup>6</sup>  
8 *Id.*; PX10.

9 On May 22, 2018, Western Milling, LLC, a feed supplier to  
10 dairies, filed a California Dairy Cattle supply lien against Del  
11 Toro. JPO. Beginning two months earlier, Del Toro began to  
12 receive notices form Pacific Gold Milk Producers, the  
13 cooperative that purchased Del Toro's milk, that his milk did  
14 not meet their quality standards. *Id.* Pacific Gold terminated  
15 their contract with Del Toro in January 2019. *Id.* These facts  
16 were not disclosed to Producers. Also undisclosed was a debt to  
17 Lester Moss and that payment to Moss was arranged through an  
18 assignment of Del Toro's milk check in March 2017.

19 Del Toro did not satisfy the renewed promissory note or  
20 amendment to promissory note when due on March 1, 2019. Around  
21 that time, Beechinor received information that a significant  
22 number of cows were missing from Del Toro's dairy. Beechinor  
23 visited the dairy and found the cows were gone. PX45.

24 During the period from May 2018 to March 2019, several  
25 significant events occurred affecting the value of Del Toro's  
26

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27 <sup>5</sup> There also no evidence that Del Toro ever advised Producers of the  
additional debt.

28 <sup>6</sup> There may have been significant other debt owed at the time of the  
renewal promissory note and amendment to promissory note were signed. PX44.

1 dairy operation, including the disappearance of between 169-279  
2 cows that were worth between \$135,198.34 and \$223,197.21;  
3 seizure of 50 cows by Harry Habib worth approximately  
4 \$40,000.00; and payment of \$154,838.00 in milk check proceeds to  
5 other creditors, such as Hultgren Dairy who sold cows to Del  
6 Toro in June 2018. JPO. Producers was unaware of these events  
7 until after the 2018 renewal note and amendment were due.

8  
9 **B.**

10 On March 11, 2019, Producers filed an action against Del  
11 Toro in the Merced County Superior Court. In its complaint,  
12 Producers alleged that Del Toro breached the renewed promissory  
13 note and the amendment. PX6. It also sought recovery of its  
14 personal property collateral and claimed Del Toro converted  
15 Producers' collateral. In addition to foreclosure of the  
16 security interest, Producers sought \$175,814.14 plus interest,  
17 attorneys' fees, and costs. *Id.*

18 Del Toro did not respond to the complaint. On May 28, 2019,  
19 Producers obtained a default judgment against Del Toro in the  
20 sum of \$193,804.54, including principal in the amount of  
21 \$175,801.14, pre-judgment accrued interest in the amount of  
22 \$13,973.35, attorneys' fees in the amount of \$3,448.15, and  
23 costs in the amount of \$581.90, totaling \$193,804.54. PX7. The  
24 judgment further provides it would continue to accrue pre-  
25 judgment interest until entered, and then accrue interest at the  
26 post-judgment rate of 10% per annum. Producers was awarded its  
27 attorneys' fees and given a judgment for claim and delivery as  
28 to its collateral. *Id.* Since then, Producers submitted two

1 Memoranda of Costs to the state court reflecting attorneys' fees  
2 and costs it incurred post-judgment. PX8, PX9. As of the  
3 petition date, Producers claims it is owed \$253,718.58.<sup>7</sup>

4  
5 **C.**

6 Del Toro filed this bankruptcy case on March 29, 2021. *See*,  
7 Case No. 21-10753-B-7 (Bankr. E.D. Cal.). Producers timely filed  
8 a complaint to determine dischargeability of debt. Compl.,  
9 Doc. #1. Producers asserts claims against Del Toro under 11  
10 U.S.C. § 523(a)(2)(A) (non-fraudulent transfer), (a)(2)(A)  
11 (fraudulent transfer), (a)(2)(B), and (a)(6) (conversion) for  
12 missing collateral, largely consisting of cattle and for being  
13 induced to renew credit by false financial information  
14 represented by Del Toro.

15 The first phase of the case was limited to the claims under  
16 11 U.S.C. § 523(a)(2)(A) (non-fraudulent transfer), (a)(2)(B),  
17 and (a)(6) (conversion). In this phase, Producers seeks a  
18 judgment that Del Toro's debt to Producers is nondischargeable  
19 in the full amount of Producers' state court default judgement  
20 as well as post-judgment interest and costs.<sup>8</sup> Producers seeks  
21 treble damages and its attorneys' fees pursuant to Cal. Pen.

22  
23 <sup>7</sup> This amount consists of principal of \$175,814.14; pre-judgment  
24 interest of \$13,973.35; \$920.51 in additional pre-judgment interest; pre-  
25 judgment attorneys' fees of \$3,448.15 and costs of \$581.90; post-judgment  
26 enforcement costs of \$28,062.75; additional costs of \$933.00; and post-  
27 judgment interest through the bankruptcy filing date at the rate of 10% per  
28 annum less a recovery of \$7,107.71.

<sup>8</sup> The second phase is for claims under 11 U.S.C. § 523(a)(2)(A)  
(fraudulent transfer) and (a)(6). In phase two, Producers seeks a judgment  
determining Del Toro's debt to Producers is nondischargeable in the sum of  
assigned milk check proceeds to other parties, the value of livestock seized  
by other creditors, the value of missing livestock, and Producers' attorneys'  
fees and costs in trying to uncover the missing assets. JPO.



1 Code § 496(c).

2 The case was tried over two days on December 8 and 9, 2022.  
3 The parties post-trial submissions were due February 28, 2023.  
4 The post-trial submissions were timely filed and the court has  
5 considered the testimony of the witnesses and the post-trial  
6 submissions. After careful consideration, the court can rule on  
7 the first phase of the litigation.  
8

9 **D.**

10 The United States District Court, Eastern District of  
11 California, has jurisdiction of this adversary proceeding under  
12 28 U.S.C. § 1334(b) because this is a civil proceeding under  
13 Title 11 of the United States Code. The District Court referred  
14 this matter to this court pursuant to 28 U.S.C. § 157(a). This  
15 is "core" proceeding under 28 U.S.C. § 157(b)(2)(I). The parties  
16 have each consented to this court's entry of a final judgment.  
17 JPO.  
18

19 **II**

20 The parties emphasized nondischargeability under 11 U.S.C.  
21 § 523(a)(2)(B) in their proof in the first phase of this  
22 litigation. Section 523(a)(2)(B) bars discharge of debts arising  
23 from a materially false statement respecting the debtor's  
24 financial condition if that statement is in writing. *Lamar,*  
25 *Archer & Cofrin, LLP. v. Appling*, 138 S. Ct. 1752, 1759 (2018).  
26 The court will focus the analysis on § 523(a)(2)(B).

27 As a general matter, when determining a debt is excepted  
28 from discharge, a bankruptcy court must construe the evidence

1 against the creditor and in favor of the debtor. *Mele v. Mele*  
2 (*In re Mele*), 501 B.R. 357, 363 (B.A.P. 9th Cir. 2013). A  
3 creditor objecting to dischargeability of its claim bears the  
4 burden of proving, by a preponderance of the evidence, that the  
5 particular debt falls within one of the exceptions to discharge  
6 enumerated under § 523(a). *Grogan v. Garner*, 498 U.S. 279, 286-  
7 91, 111 S. Ct. 654, 659-61 (1991); *In re Lansford*, 822 F.2d 902,  
8 904 (9th Cir. 1987) ("Burden is on the creditor to establish  
9 that each statute's prerequisite is met."). For purposes of  
10 § 523(a)(2), the debtor's intent, materiality, whether the  
11 creditor relied upon the debtor's false statements, and  
12 proximate cause are all questions of fact. *Candland v. Ins. Co.*  
13 *of N. Am. (In re Candland)*, 90 F.3d 1466, 1469 (9th Cir. 1996).

14 To prevail on an exception to discharge claim under  
15 § 523(a)(2)(B), the creditor must show: (1) it provided debtor  
16 with money, property, services, or credit based on a written  
17 representation of fact by the debtor as to the debtor's  
18 financial condition; (2) the representation was materially  
19 false; (3) the debtor knew the representation was false when  
20 made; (4) the debtor made the representation with the intention  
21 of deceiving the creditor; (5) the creditor relied on the  
22 representation; (6) the creditor's reliance was reasonable; and  
23 (7) damage proximately resulted from the representation. *Id.* at  
24 1469; *In re Siriani*, 967 F.2d 302, 304 (9th Cir. 1992).

25 The court will examine those elements.

26 ///

27 ///

28 ///

1                                   **A.**

2           Producers provided Del Toro with money, property, services,  
3 or an extension, renewal, or refinancing of credit based on a  
4 written representation respecting the debtor's financial  
5 condition.

6           A loan application containing information about an  
7 applicant's income constitutes a statement in writing respecting  
8 the applicant's financial condition for purposes of  
9 § 523(a)(2)(B). *See, Cashco Fin. Servs. v. McGee (In re McGee)*,  
10 359 B.R. 764, 768 (B.A.P. 9th Cir. 2006). The same would be true  
11 for a personal financial statement. A statement concerns the  
12 debtor's financial condition if it has a direct relation to or  
13 impact on the debtor's overall financial status. *Lamar, Archer &*  
14 *Cofrin*, 138 S. Ct. at 1761.

15           Del Toro's February 2018 personal financial statement was  
16 intended to provide a complete report of his financial status.  
17 It set forth current assets, current liabilities, intermediate  
18 term assets and liabilities, as well as long term assets and  
19 liabilities, and contained numerous schedules where the debtor  
20 could explain the basis for the summary on the first page of the  
21 financial statement. PX34.

22           Del Toro argues he did not sign the final typed financial  
23 statement, so he cannot be charged with presenting it to  
24 Producers. This argument is unpersuasive. Factually, Del Toro  
25 adopted the statement. TT-1 60:18-25. A financial statement can  
26 be adopted by a debtor. *See, Tallant v. Kaufman (In re Tallant)*,  
27 218 B.R. 58, 69-70 (B.A.P. 9th Cir. 1996). Beechinor testified  
28 that he went over the 2017 financial statement line by line and

1 asked Del Toro if there were any changes. After he completed the  
2 handwritten financial statement, Beechinor went over it with Del  
3 Toro who accepted it as accurate. Beechinor typed the financial  
4 statement and submitted it to Producers in Utah. PX34. The  
5 financial statement along with the renewed promissory note and  
6 amendment to promissory note were sent to Del Toro, which was  
7 Producers' usual practice. PX45.

8       The fact that the original, handwritten financial statement  
9 has been lost does not preclude proof of what was contained in  
10 the statement adopted by Del Toro. Other evidence of the content  
11 of a writing is admissible if the original is lost or destroyed,  
12 and not by the proponent acting in bad faith. Fed. R. Evid.  
13 1004(a). No evidence was presented suggesting Producers was  
14 acting in bad faith in connection with the loss of the  
15 handwritten financial statement.

16       In May 2018, Del Toro sent a text to Beechinor advising him  
17 to pick up the loan documentation. Beechinor did so. TT1 162:5-  
18 10. Del Toro adopted the information contained in the typed  
19 financial statement and he used that statement to procure the  
20 renewal, as well as the further credit extension to purchase new  
21 cows. Beechinor's memory of these events was consistent even  
22 under cross-examination. On the other hand, Del Toro's memory of  
23 the events was not consistent. TT1 144:23-148:4; TT2 22:18-20.

24       Del Toro cites unpublished *Kilbey v. Nawrocki (In re*  
25 *Nawrocki)*, No. AZ-09-1221-PaDuJu, 2010 Bankr. LEXIS 3516 (B.A.P.  
26 9th Cir. Mar. 3, 2010), to support his position that without a  
27 statement in writing, there can be no claim that the debt is  
28 nondischargeable under § 523(a)(2)(B). There, the issue was

1 whether attorneys' fees should be awarded against the  
2 unsuccessful creditor who asserted the claim. *Id.* at \*8. Though  
3 a written statement is a prerequisite to liability under  
4 § 523(a)(2)(B), there is a written statement here: the February  
5 19, 2018, personal financial statement. *Id.* at \*16; PX34. It is  
6 unsigned, but Del Toro adopted it. The uncontradicted testimony  
7 is Producers relied upon it. Del Toro's citation to *Tallant* also  
8 does not assist him. The Bankruptcy Appellate Panel there found  
9 preparation and adoption of an unsigned profit and loss  
10 statement at the debtor's direction was enough to constitute a  
11 written statement. Beechinor here obtained the information from  
12 the 2017 personal financial statement and from Del Toro, and  
13 then reviewed the contents with him. Del Toro agreed the  
14 information was accurate. That is no different than the written  
15 statement prepared at the debtor's direction and subsequently  
16 adopted in *Tallant*.

17 The court finds that Producers has sufficiently proven that  
18 Del Toro obtained the financial accommodations by a written  
19 representation of his financial condition.

20  
21 **B.**

22 The written representation of Del Toro's financial  
23 condition was materially false.

24 "A materially false statement is one which paints a  
25 substantially untruthful picture of a financial condition by  
26 misrepresenting information of the type which would normally  
27 effect [sic] the decision to grant credit." *In re Greene*, 96  
28 B.R. 279, 283 (B.A.P. 9th Cir. 1989). Such material falsity can

1 be premised upon the inclusion of false information or upon the  
2 omission of information about a debtor's financial condition.  
3 *Id.*; *Tallant*, 218 B.R. at 71. Significant misrepresentations of  
4 financial condition—on the order of several hundred thousand  
5 dollars—are of the type which would generally affect a lender's  
6 or guarantor's decision. *Candland*, 90 F.3d at 1470.

7 Plaintiff's expert, Robert Bennett, a former agricultural  
8 loan officer with considerable experience in lending decisions  
9 and special assets, concluded that the financial statement  
10 adopted by Del Toro was materially misleading to Producers such  
11 that Producers could not make a valid credit decision. PX44.  
12 Nearly \$310,000.00 of debt was undisclosed in February 2018 and  
13 months later when the renewal note and amendment were signed.  
14 Del Toro provided no updates as to the status of his  
15 liabilities. That debt included a large, secured obligation owed  
16 Harry Habib Cattle, an assignment of a portion of Del Toro's  
17 milk check to Lester Moss for nearly six years, and debts owed  
18 to Darrold Brummel, Foster's Pumps, and Caterpillar Financial  
19 Services.<sup>9</sup> Beechinor and O'Brien each testified that neither knew  
20 the extent of the debt until long after the note was renewed and  
21 additional funds were advanced, and in some cases, more than a  
22 year thereafter. PX45; PX47.

23 Del Toro does not challenge the materiality of the debt  
24 omitted from the personal financial statement, nor does Del Toro  
25 dispute that these large debts were owed. Indeed, his bankruptcy  
26 schedules included much of that debt. PX13.

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27 <sup>9</sup> Mr. Bennett also opined that more than \$300,000.00 of additional debt  
28 may have existed, but it was unclear when some of that debt was actually  
incurred.

The court finds the omission of the debt from the personal financial statement dated February 2018 is material in rendering the statement materially false.

C.

Del Toro knew the financial statement was false.

Under § 523(a)(2)(B), fraudulent misrepresentation is established by showing actual knowledge of falsity of the statement or reckless disregard for its truth. *Gertsch v. Johnson & Johnson Fin. Corp. (In re Gertsch)*, 237 B.R. 160, 167 (B.A.P. 9th Cir. 1999). The bankruptcy court may consider circumstantial evidence that tends to establish what the debtor must have actually known when taking the injury producing action. *Jett v. Sicroff (In re Sicroff)*, 401 F.3d 1101, 1106 (9th Cir. 2005). Failure to review documents containing false statements about a debtor's financial condition with the knowledge that those documents will be submitted to obtain money or credit, supports a finding a reckless disregard. *Merchs. Bank of Cal. v. Chai Cho Oh (In re Oh)*, 278 B.R. 844, 858 (Bankr. C.D. Cal. 2002).

When the February 2018 financial statement was prepared and the note and amendment signed months later, Del Toro was deeply in debt to Harry Habib. Further, at that time Del Toro's processors, Pacific Gold and Milk Producers, began questioning the quality of the milk produced by Del Toro's dairy.<sup>10</sup> Bennett testified as to the extent of debts that were outstanding.

<sup>10</sup> Eventually, the contract between Pacific Gold and Del Toro was terminated. PX28-PX30.

1 Del Toro never denied the existence of these debts. He just  
2 insisted he never misrepresented his financial condition. Del  
3 Toro said he was not asked about other debt in connection with  
4 Beechinor's preparation of the financial statement. TT1 159:22-  
5 28. Beechinor's testimony contradicts that. TT1 58:7-28, 159:22-  
6 28. On the other hand, Del Toro claims he both did and did not  
7 know what he was signing. TT1 148:18-24. The bankruptcy  
8 schedules themselves prove Del Toro knew about the debt and the  
9 debt was not included in the personal financial statement. Del  
10 Toro admitted he discussed his Producer's debt with Beechinor at  
11 the face-to-face meeting in early 2018. DXA.

12 Given the extent of the debt and Del Toro's lack of  
13 credible testimony disputing his knowledge of the debt  
14 outstanding when the personal financial statement was prepared  
15 and note and amendment signed, the court finds Del Toro knew the  
16 personal financial statement was false, or alternatively, he  
17 failed to review the documents, which support a finding of  
18 reckless disregard and establishes proof of this element.

19  
20 **D.**

21 Del Toro made the false statements with the intention of  
22 deceiving Producers.

23 In the Ninth Circuit, reckless disregard for the truth of a  
24 representation or reckless indifference to the debtor's actual  
25 circumstances can support a finding of intent for purpose of  
26 § 523(a)(2). *See, Anastas v. Am. Sav. Bank (In re Anastas)* 94  
27 F.3d. 1280, 1286 (9th Cir. 1996); *Gertsch*, 237 B.R. at 167-168.  
28 Intent to deceive can be inferred from the totality of the



1 circumstances including reckless disregard for the truth. *Id.*

2 Del Toro certainly knew in early 2018 that Producers was  
3 considering renewing the \$160,000.00 obligation carrying over  
4 from 2017. Beechinor testified he discussed this with Del Toro.  
5 In addition, Del Toro wanted to purchase additional cows. And  
6 though it is disputed by Del Toro that a further loan extension  
7 was necessary to purchase those cows, Del Toro does not dispute  
8 he signed the amendment to the promissory note. That amendment  
9 contained a recital that the loan was currently overdrawn by the  
10 amount of \$34,389.00 as a result of the purchase 33 head of  
11 springer heifers. PX4. Del Toro acknowledged by signing the  
12 amendment to the promissory note the recitals were true and  
13 correct. *Id.* So, he knew not only that there was a loan  
14 commitment overdue, but acknowledged he was overdrawn. There was  
15 no dispute the personal financial statement was submitted to  
16 Producers in connection with Del Toro's request for not only a  
17 renewal but additional funds.

18 Further, the 2017 security agreement established the extent  
19 of the interest Producers was claiming in Del Toro's property as  
20 collateral. PX5.

21 Del Toro argues the 2017 security agreement could not be  
22 relied upon by Producers because the security agreement  
23 completely changed the relationship between Del Toro and  
24 Producers, which existed since 2015. Del Toro claims he was not  
25 aware of the provisions that the collateral had to be free and  
26 clear of liens because he was not given a copy of the security  
27 agreement after he signed it. This argument makes no sense. Del  
28 Toro admitted he signed it and that it is binding on him. TT2

1 9:13-14; JPO. But he also made a statement in his trial  
2 submissions where he somehow remembered a UCC-1 would be filed  
3 as part of the security agreement. DXA. Del Toro himself  
4 testified he met with a Producers' representative in front of  
5 the dairy and "we went over this stuff here and signed it off."  
6 TT2 10:3-7. "This stuff" must have been the 2017 security  
7 agreement. Del Toro signing the security agreement establishes  
8 he knew, or could easily know, its contents.

9 Del Toro next argues he already had the loan in place in  
10 early 2018, so he did not falsely represent his financial  
11 condition with the intention of deceiving anyone. He continues  
12 he did not need to deceive anyone to get the loan. This is not a  
13 credible argument.

14 First, he does not explain Producers' extension of  
15 additional credit in excess of \$34,000.00 in early 2018, so Del  
16 Toro could purchase additional cows.

17 Second, Del Toro's testimony at trial is inconsistent  
18 regarding when he saw or did not see the personal financial  
19 statement. TT1 156:22-25, 157:7-9, :15-18.

20 Third, on the simple issue of whether it was either Messrs.  
21 O'Brien or Beechinor who allegedly told Del Toro that he had  
22 funds sufficient to purchase the cows, he continued to  
23 equivocate. In his trial declaration, Del Toro said it was  
24 Beechinor who allegedly told him there were funds available to  
25 purchase cows. DXA. On redirect examination by his counsel, he  
26 said it was O'Brien who told him he had the extra funds. Then on  
27 cross-examination, he testified it was Beechinor, not O'Brien,  
28 who said he had additional funds. The equivocation further

1 supports a direct intent to deceive Producers, or a reckless  
2 disregard of the same.

3 Debtor's reliance on *In re Evangelista*, 76 B.R. 911 (Bankr.  
4 N.D.N.Y. 1984), is misplaced. The court there relied on a bank's  
5 failure to directly discuss previous collateral encumbrances  
6 with a debtor when loan documentation was signed as persuasive  
7 of no intent to deceive. *Id.* at 914. That is not the case here.  
8 Another major problem with the *Evangelista* decision is that it  
9 applied a clear and convincing evidence standard. *Id.* at 913.  
10 *Evangelista* predates by seven years *Grogan*, where the Supreme  
11 Court established a preponderance of evidence standard.

12 The court finds there is a preponderance of evidence  
13 supporting the fact that the debtor made the misrepresentations  
14 contained in the personal financial statement with the intention  
15 of deceiving Producers.

16  
17 **E.**

18 Producers relied on the 2018 financial statement and Del  
19 Toro's representations concerning his financial condition. That  
20 reliance was reasonable.

21 O'Brien, Producers' president, testified Producers agreed  
22 to renew Del Toro's obligation in reliance on the 2018 financial  
23 statement and Del Toro's representations concerning his  
24 financial condition. PX47. He also testified, without  
25 contradiction, that based upon the 2018 financial statement and  
26 Del Toro's representations, Producers agreed to advance another  
27 \$34,389.00 to Del Toro so he could acquire more cows. *Id.*

28 To meet the reliance standard under § 523(a)(2)(B), the

1 reliance must be reasonable. Reasonable reliance means reliance  
2 that would have been reasonable to a hypothetical average  
3 person. *Heritage Pac. Fin. LLC v. Machuca (In re Machuca)*, 483  
4 B.R. 726, 736 (B.A.P. 9th Cir. 2012). Reasonable reliance is  
5 judged in light of the totality of the circumstances on a case-  
6 by-case basis. *Id.* at 736.

7 A creditor's reliance may be reasonable if the creditor  
8 adhered to its normal business practices. *Gertsch*, 237 B.R. at  
9 172. The court may consider whether the lender's normal  
10 practices align with industry standards, or if any "red flags"  
11 exist that would alert a reasonably prudent lender to consider  
12 whether the representations relied on were inaccurate. *Ins. Co.*  
13 *of N. Am. v. Cohn (In re Cohn)*, 54 F.3d 1108, 1117 (3d Cir.  
14 1995). If "red flags" exist, the creditor must support  
15 reasonable reliance with evidence explaining why it was  
16 reasonable for it to rely on the statements notwithstanding the  
17 "red flags." *Machuca*, 483 B.R. at 736-37. However, when the  
18 evidence shows materially false statements were made by the  
19 debtor, little investigation is required by the creditor to have  
20 reasonably relied on the debtor's representation. *Gertsch*, 237  
21 B.R. at 170.

22 Among the evidence offered by Producers establishing  
23 reasonable reliance is that Producers and Del Toro had a  
24 relationship since 2015. When the security agreement was signed  
25 in 2017, it extended to all personal property assets.<sup>11</sup> PX5. The  
26 2017 promissory note was in the principal sum of \$181,035.75.

---

27  
28 <sup>11</sup> The court has already found that Del Toro's testimony concerning the  
security agreement was not credible.

1 PX2. The amount of the renewal promissory note signed by Del  
2 Toro in May 2018 had been reduced by more than \$20,000.00. So,  
3 through payments or otherwise, Del Toro had reduced the  
4 principal by more than \$20,000.00 in less than one year.

5 In addition, a UCC report dated January 2018 showed various  
6 perfected liens on equipment. DXB. The only existing UCC-1,  
7 which had not lapsed covering other collateral, was in favor of  
8 Nebraska State Bank.<sup>12</sup> Further, when Beechinor visited Del Toro  
9 in February 2018, he conducted a cow count, silage measurement,  
10 hay count, and verification of feed and livestock numbers. PX45.

11 The court rejects Del Toro's argument that when the 2017  
12 promissory note was negotiated, Producers knew that Del Toro was  
13 a credit risk. O'Brien testified of certain risks in financing  
14 livestock. TT1 107:21-22. Under cross examination, O'Brien  
15 explained that when a borrower is on extension, the lending  
16 decision may be made without tax returns or profit and loss  
17 statements. TT1 109:20-25.

18 Also, Bennett, Producers' expert, testified that Producers'  
19 due diligence was objectively reasonable prior to the renewal  
20 and extension of new credit. PX44; PX10; TT1 33:9-13. He also  
21 testified that he reviewed Producers' internal credit writeup  
22 showing the information was in the financial statement. TT1  
23 35:22-25.

24 Even more to the point, Del Toro presented no evidence that  
25 the existence of the undisclosed debt was readily discoverable  
26 by Producers at the time of the renewal and further credit

---

27  
28 <sup>12</sup> Producers never disputed that they were aware of Nebraska State  
Bank's interest.

1 extension.

2 The court finds Producers relied on the February 2018  
3 financial statement and the representations concerning Del  
4 Toro's financial status. The court further finds the reliance  
5 was reasonable.

6  
7 **F.**

8 Producers suffered damages proximately resulting from Del  
9 Toro's misrepresentation. The analysis of proximately caused  
10 damages here requires two different considerations.

11 First, the extension of new monies by Producers in 2018  
12 totaling \$34,389.00. For new money loans, proximate cause is  
13 established when the falsehoods are material and involve  
14 significant amounts of money. *Candland*, 90 F.3d at 1471. Here,  
15 the falsehoods involved are well into the six figures, which is  
16 a significant amount of money. The amount involved is comparable  
17 to *Candland*. The materiality of the misrepresentation has  
18 already been discussed above.

19 Second, the \$160,000.00 renewal in early 2018 must be  
20 separately analyzed. In *Siriani*, the 9th Circuit held in the  
21 case of credit renewals, "a creditor seeking nondischargeability  
22 under § 523(a)(2)(B) must show that it had valuable collection  
23 remedies at the time it agreed to renew its commitment to the  
24 debtor, and that those remedies later became worthless."  
25 *Siriani*, 967 F.2d at 305. Notwithstanding that requirement,  
26 bankruptcy courts are not required to "divine what might have  
27 happened" with respect to the creditor's diligence, or lack  
28 thereof, in exercising its collection remedies. *Id.* at 306.

1       The 2017 security agreement gave Producers valuable  
2 collection remedies. PX5. Those remedies include the right to  
3 enforce its security interest in any or all collateral pursuant  
4 to the Uniform Commercial Code. *Id.* It could seek the  
5 appointment of a receiver to take possession of the collateral.  
6 *Id.* Producers could use, sell, or dispose of the collateral, as  
7 well as exercise other remedies. *Id.* § 6. Unfortunately, those  
8 remedies became virtually worthless by the time the renewal came  
9 due in March 2019. Approximately 50 head of cattle were  
10 repossessed by Habib Cattle Company in February 2019. Howell  
11 Test.; PX46. The value of those cows was approximately  
12 \$40,000.00. *Id.* Approximately \$68,000.00 worth of livestock was  
13 culled from Del Toro's herd in 2019. *Id.* During 2019, the total  
14 livestock leaving the herd, other than those removed by Habib  
15 Cattle Company, were valued between \$135,000.00, \$198,034.00,  
16 and \$223,197.21. *Id.* Further, there was uncontradicted evidence  
17 that over \$124,000.00 in proceeds from Del Toro's milk check  
18 were paid to Lester Moss and the Hultgrens during 2018. PX42,  
19 PX43.

20       Beechinor testified of learning from Nebraska State Bank,  
21 in March 2019, that a significant number of cows were missing  
22 from the Del Toro dairy and had essentially disappeared  
23 overnight. PX45. Producers did not learn until at least March  
24 2019, after the maturity date had passed, that Del Toro had  
25 given a security interest in livestock to Harry Habib and had  
26 assigned the milk checks to third parties.<sup>13</sup>

---

27       <sup>13</sup> Apparently, the reason Harry Habib's UCC-1 did not appear on the UCC  
28 Report is that the UCC was prepared without an accurate surname for Mr. Del  
Toro. DXB; PX15.

1 Both Bennett, Producers' lending expert, and O'Brien,  
2 Producers' president, testified the 2018 personal financial  
3 statement was highly inaccurate based upon the undisclosed debt.  
4 The disclosure of the debt would have resulted in a different  
5 lending decision. PX44; TT1 133:15-134:27. The missing livestock  
6 and the undisclosed milk check assignments are proximately  
7 caused damages beyond the unpaid debt.

8 Del Toro's argument that Producers' filing of a UCC-1 or  
9 branding of cattle would have mitigated their losses is  
10 unpersuasive. Del Toro sold or otherwise removed cattle from his  
11 dairy after Habib and Nebraska State Bank filed their UCC-1  
12 statements. There is no evidence that the filing of a UCC-1  
13 would have prevented the removal of the livestock or the loss of  
14 proceeds due to the milk check assignments. Further, under  
15 *Siriani*, it is not necessary for the bankruptcy court to  
16 speculate as to what would have occurred had Producers filed a  
17 UCC-1 financing statement or branded the livestock. *Siriani*, 967  
18 F.2d at 306. Between the livestock loss and the milk check  
19 assignments, there is more than enough value in Producers'  
20 collateral to satisfy a \$160,000.00 renewal in May 2018.

21 The court finds Producers' damages were proximately caused  
22 by the false information contained in the February 2018 personal  
23 financial statement.

24  
25 **G.**

26 Producers seeks treble damages against Del Toro under Cal.  
27 Pen. Code § 496(c). The court declines to order such relief.

28 Pen. Code § 496(a) prohibits knowingly concealing or



1 withholding stolen property. *See, Verdugo-Gonzalez v. Holder*,  
2 581 F.3d 1059, 1061 (9th Cir. 2009). Those injured by a  
3 violation may bring an action for treble damages, plus costs and  
4 attorneys' fees. Pen. Code § 496(c). Producers holds a  
5 prepetition judgment against Del Toro for the balance owed on  
6 its renewed promissory note and extension of new funds.

7 Since the state court adjudicated the debt, the only issue  
8 before this court is whether the debt was dischargeable. With an  
9 existing valid state court judgment, the bankruptcy court should  
10 not issue a new judgment. *Hamilton v. Elite of L.A., Inc. (In re*  
11 *Hamilton)*, 584 B.R. 310, 322-24 (B.A.P. 9th Cir. 2018), *aff'd*,  
12 785 F. Appx. 438 (9th Cir. 2019). The court's judgment here  
13 deems the Merced County Superior Court's judgment to be  
14 nondischargeable.

15 That said, the other aspects of the judgment, including  
16 attorneys' fees and accrual of interest at the state rate, are  
17 appropriate damages accruing. *Shoen v. Schoen*, 176 F.3d 1150,  
18 1166 (9th Cir. 1999); *see also, Sasson v. Sokoloff (In re*  
19 *Sasson)*, 424 F.3d 864, 874 (9th Cir. 2005) (although a  
20 bankruptcy court has jurisdiction to enter a new money judgment,  
21 recognizing "the existence of a prior judgment may introduce  
22 some prudential concerns, such as comity, that a bankruptcy  
23 court should take into consideration in fashioning relief.");  
24 *Smith v. Lachter (In re Smith)*, 242 B.R. 694, 703 (B.A.P. 9th  
25 Cir. 1999) ("[I]t follows that a separate judgment is not  
26 necessary when the claim has already been reduced to judgment by  
27 another court of competent jurisdiction."). The court here is  
28 not entering a new money judgment but merely a judgment deeming


1 the state court judgment to be nondischargeable. Accordingly,  
2 the court is not going to eliminate, reduce, or augment any of  
3 the components of the Merced Superior Court judgment.

4  
5 **CONCLUSION**

6 For the foregoing reasons, judgment shall be entered in  
7 favor of Producers Livestock Marketing Association and against  
8 Gustavo Del Toro, by which the state court judgment rendered by  
9 the Merced County Superior Court on May 28, 2019 in Case No. 19-  
10 CV-01019 is nondischargeable under 11 U.S.C. § 523(a)(2)(B).  
11 Counsel for Producers shall prepare a judgment in conformance  
12 with this ruling. Any claim for attorneys' fees shall be brought  
13 before the court under Fed. R. Civ. P. 54, *as applicable under*  
14 Fed. R. Bankr. P. 7054. Should any fees be awarded, an amended  
15 judgment shall be prepared as ordered.

16  
17 **Dated: Mar 28, 2023**

**By the Court**

18  
19   
20 René Lastreto II, Judge  
21 United States Bankruptcy Court  
22  
23  
24  
25  
26  
27  
28

**Instructions to Clerk of Court  
Service List - Not Part of Order/Judgment**

The Clerk of Court is instructed to send the Order/Judgment or other court generated document transmitted herewith to the parties below. The Clerk of Court will send the Order via the BNC or, if checked \_\_\_\_, via the U.S. mail.

Gustavo Del Toro  
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